2021 CAPITAL LITIGATION CONFERENCE: DELVING INTO DEFENSE EXPERTS

February 25 - 26, 2021

CASELAW UPDATE

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Capital Litigation Caselaw Update

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Arizona Supreme Court

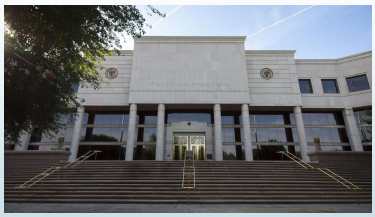

Image source: azcentral.com

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State v. Riley, 248 Ariz. 154 (2020)

Direct appeal opinion

- Background: While incarcerated at ASPC-Lewis in 2008, Riley and two accomplices murdered another inmate to gain membership in the Aryan Brotherhood. Riley and his accomplices stabbed the inmate more than 100 times. Two years later, Riley wrote a letter describing the murder in detail, which he signed, "Your hero the butcher."
- Aggravating factors: prior conviction for a serious offense, *see* A.R.S. § 13-751(F)(2) (2008); cruel, heinous or depraved, *see* A.R.S. § 13-751(F)(6) (2008); murder committed while in custody, *see* A.R.S. § 13-751(F)(7); murder committed to further, promote, or assist a criminal street gang, *see* A.R.S. § 13-751(F)(11); and murder committed in a cold-and-calculated manner, without pretense of moral or legal justification, *see* A.R.S. § 13-751(F)(13)

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Riley (continued)

- Major issues/holdings
  - It was error for trial court, in jury questionnaire, to describe aggravating factors as "very few and very specific" because vagueness caselaw requires only "adequate specificity"; error not fundamental or reversible because jurors were correctly instructed on procedure and burden of proof
  - Jury instruction defining cold-and-calculated factor correctly stated the law, despite minor omission from the instruction approved in *State v. Hausner*, 230 Ariz. 60 (2012), and was not prejudicial because the evidence (particularly Riley's letter) overwhelmingly established the factor

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State v. Allen, 248 Ariz. 352 (2020)

Direct appeal opinion

- Background: Allen lived with several members of his wife's extended family, including her cousin, the 10-year-old victim. On July 11, 2011, Allen and his wife forced the victim to engage in various acts of physical exertion as punishment for stealing a popsicle. They then locked her inside a small, plastic box, as they had done several times before, and went to bed. Overnight, the victim suffocated.
- Aggravating factors: prior serious offense, *see* A.R.S. § 13-751(F)(2) (2011); especially cruel, heinous or depraved, *see* A.R.S. § 13-751(F)(6) (2011); and age of the victim, *see* A.R.S. § 13-751(F)(9).

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Allen (continued)

- Major issues/holdings
  - Sufficiency of the evidence to support the jury's *Enmund/Tison* findings
    - *Enmund v. Florida*, 458 U.S. 782 (1982): requisite level of intent exists if defendant kills, attempts to kill, or intends that a killing occur or that lethal force be used
    - *Tison v. Arizona*, 481 U.S. 137 (1987): requisite level of intent exists if defendant is a major participant in the underlying felony and acts with reckless indifference to human life
    - Court rejects Allen's argument that *Enmund* was not satisfied because he did not intend to kill the victim; Allen personally confined the victim to the box and therefore *actually* killed her
    - Court rejects Allen's argument that *Tison* was not satisfied because he had confined the victim to the box before without incident and her death was not foreseeable; confining a child to a small plastic box carries a grave risk of death, particularly where she was left in the box for a longer period than on previous occasions

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Allen (continued)

- Sufficiency of the evidence to establish the (F)(6) through the caregiver relationship
  - Allen argued that the relationship did not exist because he was only a part-time caregiver
  - Court rejects argument; Allen, along with the other adults in the house, shared in caring for the victim and he was responsible for supervising her at the time of her death
- Prosecutorial error in closing argument
  - "The defendant said yesterday that [the victim] didn't deserve to die. Tell him by your verdict that his life is not more valuable than [the victim's]."
  - This comment "skirted the line and arguably crossed it by asking jurors to tell Allen that his life is not more valuable than [the victim's] life."
  - But no prejudice because the comment was fleeting, was made in the midst of more developed arguments that were properly focused, and did not directly ask jurors to impose sentence based on a comparison of worth. Moreover, the trial court correctly instructed the jurors on the process of selecting the death penalty.
- Noncapital sentences remanded for resentencing based on enhancement/aggravation errors

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State v. Smith, 250 Ariz. 69 (2020)

Direct appeal opinion

- Background: Smith shot and killed his infant child's mother and inflicted a non-fatal gunshot wound to the infant's leg. Several months earlier, while the mother was pregnant, Smith orchestrated an attack on her. The evidence established that Smith killed his child's mother in part to avoid paying child support.
- Aggravating factors: Prior serious offense (child abuse), *see* A.R.S. § 13-751(F)(2) (2014); pecuniary gain, *see* A.R.S. § 13-751(F)(5) (2014)
- Major issues/holdings
  - Warrantless acquisition of Cell Site Location Information (which placed Smith at the scene of the murder) fell within the good-faith exception to the warrant requirement

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Smith (continued)

- No confrontation clause violation where trial court precluded Smith from cross-examining case agent on county attorney's decision not to charge him with potential on-duty criminal offenses, where court permitted substantial impeachment, including on internal police investigation; Smith's theory of bias was speculative; and detective's credibility was not a critical issue in the case
- No prejudice from trial court's failure to reinstruct jurors after argument in aggravation phase, where the phase lasted less than 50 minutes, court instructed jurors at the beginning of the phase, and court gave jurors written copies of instructions and referenced them at the end of the phase (*Note:* trial court has little discretion to depart from order of aggravation phase set forth in Rule 19)
- Sufficient evidence of pecuniary gain (notable because the pecuniary gain here was based on avoidance of pecuniary *loss* in the form of child support)

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State v. Strong

Unpublished decision order filed 5/26/2020

- Strong was convicted of murdering six members of a Yuma family and sentenced to death for each murder. He had previously been convicted of murdering a Yuma doctor, but this fact was not admitted at the guilt phase.
- After trial, Strong alleged under Rules 24.1 and 24.2 that Juror 47 engaged in misconduct by failing to disclose her knowledge of Strong's prior murder conviction. The trial court denied the Rule 24.1 motion as untimely and denied the Rule 24.2 motion on the merits, without an evidentiary hearing.
- Two-part test
  - Did the juror know information that was "possibly prejudicial," *i.e.* that it raised a credible risk of affecting the trial's outcome? If so,
  - A presumption of prejudice attaches, and the State must prove harmless error

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Strong (continued)

- Court found presumption of prejudice and remanded for an evidentiary hearing on the Rule 24.2 motion "to determine the circumstances of Juror 47's alleged misconduct and knowledge of the [prior] murder and prior conviction, and whether or not it was harmless."
- Appeal is stayed pending hearing's outcome

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State v. Poyson, 250 Ariz. 48 (2020)

Ninth Circuit *McKinney* remand

- Background: Poyson and Frank Anderson killed three people in Golden Valley, in order to steal their belongings. Poyson was sentenced to death, and unsuccessfully pursued a direct appeal and state post-conviction relief. The district court subsequently denied habeas relief but the Ninth Circuit reversed, finding that the Arizona Supreme Court had applied an unconstitutional causal-nexus test on independent review. *See McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc)
- Arizona Supreme Court agreed to conduct a new independent review to cure the constitutional error the Ninth Circuit found
- Scope of new independent review limited to mitigation (considered without perceived causal-nexus test) and propriety of death penalty

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Poyson (continued)

- On new independent review, court again found the mitigation was not entitled to significant weight
  - A.R.S. § 13-751(G)(1) (significant impairment): not proven, primarily because Poyson engaged in significant "goal-oriented" behavior before and after the three murders
  - Drug abuse and mental-health issues: little weight as non-statutory mitigation because Poyson's "actions were not intoxicated and impulsive but constituted a planned and deliberate attack on his three victims over the course of a night"
  - A.R.S. § 13-751(G)(5) (age) (19): little weight because of Poyson's substantial role in the murders and his prior juvenile offenses
  - Abusive childhood: "no substantial weight" because murders were deliberate and well-planned
  - Remorse/cooperation: Little weight in light of aggravation and initial deceptive acts

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Poyson (continued)

  - Potential for rehabilitation/good behavior in prison: some mitigating weight to rehabilitation potential, but minimal weight to good behavior in prison
  - Family support: proven but entitled to minimal weight
- On balance, leniency not warranted because the aggravation, consisting of cruelty, pecuniary gain, and multiple murders, was "particularly weighty," and the multiple-murder factor alone was entitled to "extraordinary weight"

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State ex rel. Montgomery v. Kemp (Altamirano), 249 Ariz. 320 (2020)

Pretrial special action (intellectual disability)

- Arizona's intellectual disability statute (A.R.S. § 13-753(K)(3)) requires:
  - Significantly subaverage general intellectual functioning +
  - Significant adaptive-behavior impairment +
  - Onset of both prior to age 18
- *Altamirano* concerns the potential impact of *Moore (I) v. Texas*, 137 S. Ct. 1309 (2017), and *Moore (II) v. Texas*, 139 S. Ct. 666 (2019) on Arizona's definition of adaptive behavior
- *Moore I* and *II* require states to be informed by the medical community's views in making the legal determination of intellectual disability

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Altamirano (continued)

- Arizona follows standards of medical community by addressing categories of life skills (conceptual, social, and practical) that the medical community has identified, as well as by permitting consideration of deficits
- Requirement of "overall assessment" to determine adaptive behavior prong does not conflict with *Moore* because our statute is informed by the medical community and the overall assessment simply provides a "flexible approach" that is "capable of adapting to changes in the medical community"

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Altamirano (continued)

- Procedure for assessing adaptive behavior
  - Conduct overall assessment by considering strengths and weaknesses in each life-skill category to determine if there are deficits in a category; court may not use strengths from another category to offset weaknesses
  - If no deficits, the inquiry is over
  - If deficits, court must consider whether the deficits affect functioning in light of the overall assessment of the life-skill categories, such that defendant does not operate with the degree of independence and responsibility expected of his age and cultural group and can be considered to have impaired adaptive functioning. *See* A.R.S. § 13-753 (K)(1).
- Remanded because trial court failed to conduct overall assessment

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State ex rel. Adel v. Hannah (Buckman), 249 Ariz. 537 (2020)

Pretrial special action (Rule 24.2)

- Background:
  - Defendant was convicted of child abuse and first-degree murder. At the aggravation phase, she unsuccessfully requested a diminished-capacity instruction relating to the *Enmund/Tison* findings. The trial court denied the instruction, and the jury later found *Enmund/Tison* satisfied but hung in the penalty phase.
  - Before retrial, the Arizona Supreme Court held in *State v. Miles*, 243 Ariz. 511 (2018), that diminished-capacity evidence is admissible to determine the "reckless indifference" prong of *Tison*.
  - Defendant moved to vacate aggravation-phase verdicts under Rule 24.2; trial court initially denied as premature but, after reassignment, a different judge granted the motion

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Buckman (continued)

- Rule 24.2 requires that a judgement be vacated if, as relevant here, the conviction "was obtained in violation of the United States or Arizona constitutions." Ariz. R. Crim. P. 24.2(a)(3). Where no notice of appeal has been filed, a Rule 24.2 motion must be filed "no later than 60 days after the entry of judgment and sentence." Ariz. R. Crim. P. 24.2(b).
- Question: Did the trial court err by employing Rule 24.2 to vacate the aggravation verdicts where no judgment or sentence had been entered?
- Answer: yes
  - The *Enmund/Tison* determination is neither a judgment nor a sentence, so Rule 24.2 does not apply
  - Rule 24.2 motions filed before judgment and sentence are premature
  - Any "procedural inefficiency" "is a consequence of Rule 24.2's text, not a flawed interpretation of it"

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State v. Soto-Fong, 250 Ariz. 1 (2020)

Post-conviction relief (non-capital)

- Question: Does the Eighth Amendment (as construed in *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)) prohibit consecutive sentences that, when combined, exceed a juvenile's life expectancy?
- "*Miller*'s holding was narrow—a trial court must consider certain factors before sentencing a juvenile to life without the possibility of parole. 567 U.S. at 483. *Miller did not* impose a categorical ban on parole-ineligible life sentences for juveniles."
- *Graham* and progeny do not apply to de facto juvenile life sentences
  - Aggregate sentences not specifically addressed by Supreme Court; Defendants relied on dicta
  - Eighth Amendment analysis traditionally focuses on the sentence for each crime and not cumulative sentences
  - Adopting Defendants' argument would amount to judicial creation of a sentencing scheme, in violation of separation of powers
- Arizona Constitution likewise does not bar de facto life sentences

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Chaparro v. Shinn, 248 Ariz. 138 (2020)

Certified question from district court (non-capital)

- District court certified question to Arizona Supreme Court: "Whether, in light of A.R.S. § 41-1604.09, a person convicted of first degree murder following a jury trial for actions that took place on or after January 1, 1994, is parole eligible after 25 years when the sentencing order states that he is sentenced to 'life without possibility of parole for 25 years.'"
- Holding: sentencing order that imposes life without possibility of parole for 25 years "means the convicted defendant is eligible for parole after serving 25 years' imprisonment despite § 41-1604.09's prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994."
- Additional holding: court lacks jurisdiction to correct an illegally lenient sentence when the State fails to timely appeal.

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Upcoming Cases of Interest

- *State v. Cruz*
  - Defense petition for review from denial of post-conviction relief.
  - Issues (as rephrased by Arizona Supreme Court): "1. Was *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (*Lynch II*) a significant change in the law for purposes of Ariz. R. Cr. P. 32.1(g)? 2. Is *Lynch II* retroactively applicable to petitioner on collateral review? 3. If *Lynch II* applies retroactively, would its application have probably overturned petitioner's sentence per Rule 32.1(g)?"
  - Affects *State v. Rose*
- *State v. Miller*
  - State's petition for review from grant of post-conviction relief.
  - Issue: Did counsel's failure to object to an error in the Revised Arizona Jury Instruction defining the A.R.S. § 13-751(G)(1) mitigating factor constitute ineffective assistance warranting relief as to the defendant's five death sentences?

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Upcoming Cases of Interest (continued)

- Repeal of aggravating factors
  - In 2019, the legislature condensed the two pecuniary gain aggravating factors (former (F)(4) and (F)(5)) such that the new factor applies only to murder for hire, and eliminated other factors, including zone-of-danger (former (F)(3)) and cold-and-calculated (former (F)(13))
  - Flurry of post-conviction petitions have been filed, presenting various arguments that the legislation invalidates death sentences that are based on the repealed factors, including an argument that the repeal reflects an emerging consensus that the factors do not warrant death
  - Conflicting rulings: *State v. Roseberry* (Yavapai County—denying relief), and *State v. Greene* (Pima County—granting relief)

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Ninth Circuit

Image Source: Library of Congress, https://guides.loc.gov/federal-appellate-court-records-briefs/ninth-circuit

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Hooper v. Shinn, 985 F.3d 594 (9th Cir. 2021)

Habeas corpus/AEDPA

- Background: A Chicago crime organization hired Hooper, along with co-defendants William Bracy and Ed McCall, to murder the owner of a Phoenix business. On New Years Eve 1980, Hooper and his accomplices invaded the business owner's home, killed him and his mother-in-law, and severely injured his wife. Hooper was sentenced to death and was denied relief on direct appeal, in his numerous state post-conviction proceedings, and in his federal habeas proceeding.
- The Ninth Circuit affirmed the district court's denial of habeas relief, addressing several issues
  - The state court reasonably rejected Hooper's claims that the State failed to timely disclose *Brady* material; alternatively, those claims fail on *de novo* review

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Hooper (continued)

- The district court did not err by denying Hooper's motion to amend his habeas petition with claims stemming from the invalidation of his Illinois prior conviction
- Hooper failed to excuse the procedural default of his ineffective-assistance-at-sentencing claim under *Martinez v. Ryan*, 566 U.S. 1 (2012)

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Ramirez v. Shinn, 971 F.3d 1116 (9th Cir. 2020), and *Jones v. Shinn*, 971 F.3d 1133 (9th Cir. 2020) (published multi-judge dissent)

- Recurring issue: how does *Martinez* (which the Ninth Circuit has interpreted to permit, in some circumstances, factual development on ineffective-assistance claims) interact with 28 U.S.C. § 2254(e)(2) (which generally prohibits evidentiary development in federal court for prisoners who were not diligent in state court, subject to narrow exceptions)
- Ninth Circuit in *Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019), concluded the statute simply does not apply when procedural default is excused under *Martinez*
- Court denied en banc rehearing in *Jones* and *Ramirez*, which presented a similar issue; led to a published dissent in each case from Judge Collins opining that the judge-created rule of *Martinez* must yield to statutory mandates
- Arizona has filed petition for writ of certiorari

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United States Supreme Court

Image Source: Supreme Court website, supremecourt.gov

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Shinn v. Kayer, 141 S. Ct. 517 (2020)

Habeas corpus/AEDPA (Arizona's petition)

- Background: Kayer murdered the victim in 1994 along a rural Yavapai County roadside to avoid paying a gambling debt and to steal valuables. The state courts consistently denied relief and the district court denied habeas relief. The Ninth Circuit, however, reversed the district court and granted Kayer a new sentencing based on ineffective assistance of counsel for failing to present certain mitigation—a claim the state post-conviction court had heard and rejected.
- Supreme Court granted Arizona's petition for writ of certiorari and reversed in a per curiam opinion
  - "The Ninth Circuit resolved this case in a manner fundamentally inconsistent with AEDPA."
  - Under AEDPA's deferential standards, the state court reasonably found a lack of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

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Andrus v. Texas, 140 S.Ct. 1875 (2020)

Ineffective Assistance of Counsel

- Background: Defendant killed two people in an attempted carjacking and was sentenced to death by a Texas jury. On post-conviction, the Texas trial court found counsel ineffective for failing to investigate and present mitigation regarding Andrus's abusive and neglectful childhood. The Texas Court of Criminal Appeals reversed.
- The Supreme Court granted certiorari and reversed in a per curiam opinion
  - Court found deficient performance based on counsel's almost complete failure to investigate; selection of a mitigation theory that "backfired by bolstering the State's aggravation case"; and failure to investigate and rebut aggravation evidence
  - But court remanded for Texas Court of Criminal Appeals to assess prejudice because there was "a significant question whether [that court] properly considered prejudice"
- Alito dissents with Thomas and Gorsuch joining

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Barr v. Lee, 140 S. Ct. 2590 (2020)

Federal lethal-injection protocol

- Federal government carried out 13 executions in 2020 with single-drug pentobarbital protocol
- Lee (first scheduled execution) and others attempted to challenge use of pentobarbital as cruel and unusual because of claimed risk of "flash pulmonary edema." District court granted preliminary injunction.
- Supreme Court vacated injunction: Court found Plaintiffs unlikely to succeed on the merits of their Eighth Amendment claim, citing pentobarbital's widespread successful use and general acceptance by prisoners challenging other execution methods.
- Dissents from Breyer (joined by Ginsburg), and Sotomayor (joined by Ginsburg and Kagan). *See also Barr v. Purkey*, 140 S. Ct. 2594 (July 16, 2020) (Mem.) (Breyer, J., dissenting from summary order lifting stay of second scheduled execution) (opining that decades-long delay in carrying out judgments of death renders penalty unconstitutional).

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Upcoming Cases of Interest

- *Shinn v. Ramirez & Jones* (AEDPA/habeas issue; Arizona's petition): "Does application of the equitable rule this Court announced in *Martinez v. Ryan*, render 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief."
- *Jones v. Mississippi*: "Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole." (certiorari granted; case argued November 3, 2020)
- In D.C. Circuit: Arizona certified by former Attorney General Barr for expedited capital habeas review procedures under 28 U.S.C. § 2261; appeal brought by inmates and Federal Public Defender recently held in abeyance on DOJ's motion. *See Office of the Federal Public Defender for the District of Arizona, et al. v. Wilkinson*, No. 20-1144.

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